93-495

No. 93-_____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DENZIL W. ROBBINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SCPT

QUESTION PRESENTED

The question presented is:

Do the Fifth Amendment Due Process Clause and the Sixth Amendment right to notice and trial by jury sanction a conviction under 18 U.S.C. § 152 for making a false oath in connection with answers given in a bankruptcy deposition when

(a) the United States Court of Appeals for the Eighth Circuit acknowledged that the "answers to the questions that are the basis of the false oath charge" were in fact "literally true," but

(b) nonetheless affirmed the conviction because those answers responded to questions based on allegedly false prior testimony for which the indictment made no charge, and on which the jury was not instructed?

PARTIES TO PROCEEDINGS BELOW

The parties to this proceeding were the parties to the proceedings below.

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DENZIL W. ROBBINS,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Denzil Robbins, respectfully prays that this Court grant its writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit entered June 28, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, p. 1a, *infra,* is reported at 997 F.2d 390 (8th Cir. 1993). It is unofficially reported at Bankr. L. Rep. (CCH) ¶ 75,329 (8th Cir. June 28,

1993), and 24 Bankr. Ct. Dec. (CRR) 668 (8th Cir. June 28, 1993). The order of the Court of Appeals denying rehearing and rehearing *en banc*, p. 20a, *infra*, is not reported.

The judgment of the United States District Court for the Western District of Missouri, p. 12a, *infra*, is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was entered June 28, 1993. P. 1a, *infra*. Pursuant to 8TH CIR. R. 35A(c)(4), a suggestion for rehearing *en banc* is deemed also to encompass both a petition for panel rehearing. Robbins' timely suggestion for rehearing *en banc* and the included petition for panel rehearing were denied August 27, 1993. P. 20a, *infra*. This petition is filed within 90 days from the entry of the opinion June 28, 1993. *See* SUP. CT. R. 13.4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation . . . .

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18 U.S.C. § 152:

Whoever knowingly and fraudulently makes a false oath . . . in relation to any case under title 11 . . .
. . . .
Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Robbins was convicted of making a false oath in a bankruptcy proceeding in violation of 18 U.S.C. § 152. The facts are straightforward.

Robbins was a debtor in an involuntary Chapter 7 bankruptcy proceeding. The bankruptcy trustee brought an adversary action against Robbins, and others, in which he sought to compel turnover of a number of specified assets.

A. *Robbins' deposition testimony.*

On October 27, 1987, the trustee's chief trial counsel, Mathew Placzek, deposed Robbins. During the course of the deposition, the following exchange

occurred:

"Q. (By Mr. Placzek) Sir, what is 11th and Meridian? Is that a financial institution?
"A. No, huh-uh.
"Q. What is it?
"A. That was a little corporation that was formed to buy a motel at 11th and—excuse me, I got to back up. Did you say 11th and Meridian?
"Q. Yes.
"A. I do not know what that 11th and Meridian is. *There's a company called 11th and MacArthur.*
"Q. Okay. And that is a corporation that was formed when?
"A. Oh, last couple of years.
. . . .
"Q. Is the corporation still in existence?
"A. Yes, sir. Didn't buy the property it was going to buy.
"Q. *Does it have any assets?*
"A. *No.*
"Q. *Did it have any assets at any time?*
"A. *No, sir, not that I remember.*" (Emphasis added.)

There existed a corporation known as *MacArthur & 11th Properties, Inc.*, of which Robbins was president. It had an interest in two promissory notes. One was a $500,000.00 note, the payment of which was secured by a mortgage on a Ramada Inn located in Oklahoma City, Oklahoma. By an agreement dated September 23, 1987, it exchanged its rights in that note for real estate and an alfalfa cubing facility near

Artesia, New Mexico. The other was a $9,500.00 promissory note, which it assigned without recourse December 1, 1987.

The bankruptcy court in its June 20, 1988, Findings of Fact and Conclusions of Law in the adversary proceeding found that 11th & MacArthur did in fact exist. It mentioned 11th and MacArthur five separate times. It found that Robbins formed 14 corporations, including "Eleventh & MacArthur," p. 25a, *infra*; that any ownership that Robbins had in "11th & MacArthur" was property of the estate, p. 28a, *infra*; that there might exist assets, of which the trustee was unaware, in the name of "Eleventh & MacArthur" and 13 other corporations, p. 29a, *infra*; that the creation of "Eleventh & MacArthur" and 13 other corporations was for the express purpose of avoiding creditors, *id.*; and that the trustee was entitled to an accounting of the source of funds used to procure any assets in the name of "Eleventh & MacArthur" and 13 other corporations, p. 31a, *infra*. The bankruptcy court stopped short of determining that "11th & MacArthur" did, in fact, possess assets.

B. *The false oath charge.*

The trustee referred the case to the United States Attorney for prosecution. That referral led to the grand jury indictment that gives rise to this case.

The indictment charged Robbins with one count of making a false oath in violation of 18 U.S.C. § 152

and with five unrelated counts.[1] The indictment recited that Robbins "testified that a corporation owned by [Robbins] and identified in the testimony as '11th & MacArthur' then had no assets and had never had any assets." It then alleged that Robbins "did knowingly and fraudulently make a false oath as to a material matter" relating to the bankruptcy proceedings by testifying "that '11th and MacArthur' Properties, Inc did not have any assets at any time, when, in fact, [he] then and there well knew and believed the MacArthur and 11th Properties, Inc. previously did have assets." The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

C. *The trial proceedings.*

Placzek said at trial that he was confused at the deposition. "I think there was a piece of property on I-44 and Meridian, and then there was 11th and MacArthur," he said. "I think what happened is, I had Eleventh and Meridian confused with 11th and MacArthur, and I had the two of them interposed."

Robbins' answers, Placzek conceded, met his questions substantively. Placzek said that Robbins answered the very question he had asked "as to the corporation, Eleventh and MacArthur, that it didn't

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[1]The indictment also charged Robbins with five counts of fraudulently transferring and concealing assets subject to the jurisdiction of the bankruptcy court. The jury acquitted him of one count, and the Court of Appeals properly reversed the convictions on the other four. *See United States* v. *Robbins*, 997 F.2d 390, 392-94 (8th Cir. 1993).

have any assets." He admitted that "in light of the confusion here, the questions, at least that were asked, and the answers that he gave concerned 11th and MacArthur."

The Government sought to prove the nonexistence of "11th and MacArthur Properties, Inc.," by introducing into evidence a certificate from the Oklahoma Secretary of State certifying that "11th and MacArthur Properties, Inc.," was not incorporated or qualified to do business in Oklahoma. On its face that certificate did not pertain to "11th and MacArthur," the entity that Robbins identified. There was no testimony or documentary evidence whatsoever of the nonexistence of "11th and MacArthur." Moreover, the certificate pertained to only Oklahoma and did not certify that no such corporation existed or was authorized to do business in some other state.

The District Court instructed the jury as follows:

> "The crime of making a false oath in a bankruptcy proceeding has four essential elements, which are:
>
> "*One,* there existed a proceeding in bankruptcy;
>
> "*Two,* the defendant made an oath in relation to the bankruptcy proceeding, namely that on or about October 27 and/or 28, 1987 defendant stated in a deposition that McArthur and 11th had no assets;
>
> "*Three,* the oath was false; and
>
> "*Four,* the defendant made the oath knowingly and fraudulently.
>
> "For you to find defendant Denzil Robbins guilty of the crime charged in Count Six, the

> government must prove all of these essential elements beyond a reasonable doubt; otherwise, you must find the defendant not guilty of the crime charged in Count Six."

The jury found Robbins guilty of making a false oath.

D. *The Court of Appeals review.*

Robbins appealed to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1291. He argued that under *Bronston* v. *United States,* 409 U.S. 352 (1973), the conviction could not stand because his "no" answers to Placzek's questions whether 11th and MacArthur had, or had ever had, any assets were literally true and that the Government had not proven otherwise.

The Court of Appeals found that the indictment rested upon the alleged falsity of the "no" answers. "Robbins' 'no' answers to [those] questions," it said, "are the basis for this perjury charge." Furthermore, it agreed that Robbins' testimony that 11th and MacArthur had no assets was, in fact, truthful. His "answers to the questions that are the basis of the false oath charge," the court said, were "literally true." P. 10a, *infra.*

What the Court of Appeals found false, and the basis for its decision affirming the conviction, was Robbins' identification of the corporation. The court recounted his testimony about the existence of 11th and MacArthur. It then held that while his answers regarding the assets of 11th and MacArthur were literally true, he "cannot escape a false oath charge *by misleading the questioner with false testimony* and

then supply *literally true answers to . . . questions based on his false testimony.*" P. 10a, *infra* (emphasis added). Considered in that context, the court held, the evidence supported the verdict. Pp. 10a-11a, *infra*.

From the affirmance of the conviction for making a false oath, Robbins now seeks this Court's review.

REASONS FOR ALLOWING THE WRIT

For at least two reasons, the Court should grant the writ of certiorari:

First, the Court of Appeals affirmed the false oath conviction on the basis of a crime that the indictment did not charge and on which the jury was not instructed. This Court has repeatedly, and unequivocally, refused to countenance such a plain denial of due process. It should refuse to do so now.

Second, the Court of Appeals affirmed the conviction despite its acknowledgement that Robbins' answers to the questions it said were the basis for the false oath charge were not false, but literally true. That decision conflicts with this Court's decision in *Bronston,* with the Eighth Circuit's own prior decision, and the decisions of other United States Courts of Appeals.

A. *Affirmance of the false oath conviction on the basis of a crime that the indictment did not charge, and on which the jury was not instructed, deprives Robbins of due process in contravention of this Court's decisions.*

It is fundamental that conviction "upon a charge

not made would be sheer denial of due process." *DeJonge* v. *Oregon*, 299 U.S. 353, 362 (1937). *See Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979). Accordingly, this Court has repeatedly said that an appellate court may not sustain a criminal conviction on either factual or legal grounds neither charged nor tried. *McCormick* v. *United States*, 111 S. Ct. 1807, 1815 & n.8 (1991); *Dunn* v. *United States*, 442 U.S. 100, 106-07 (1979); *Eaton* v. *City of Tulsa*, 415 U.S. 697, 698-99 (1974); *Garner* v. *Louisiana*, 368 U.S. 157, 164 (1961); *Cole* v. *Arkansas*, 333 U.S. 196, 201-02 (1948). This prohibition stems from the accused's constitutional rights to notice of the specific charge, *id.*, at 201, and to a trial by jury, *McCormick*, 111 S. Ct., at 1815 & n.8. *See* U.S. CONST. amend. VI.

In this case the indictment charged Robbins with testifying falsely that MacArthur & 11th Properties, Inc., had no assets by testifying "that '11th and MacArthur' Properties, Inc did not have any assets at any time, when, in fact, [he] then and there well knew and believed the MacArthur and 11th Properties, Inc., previously did have assets." It did not charge him with falsely identifying the corporation. Clearly that is how the Court of Appeals read the indictment.[2] The District Court accordingly instructed the jury that in order to convict Robbins, it had to find that he

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[2]The Court of Appeals said: "The questioner accepted [Robbins'] testimony [about 11th and MacArthur] and asked if '11th and MacArthur' had, or if the corporation ever had, any assets. *Robbins' 'no' answers to these questions are the basis for this perjury charge.*" P. 10a, *infra* (emphasis added).

"stated in a deposition that McArthur and 11th had no assets" and that "the oath was false."

That was not, however, the theory upon which the Court of Appeals affirmed the conviction. The court found that the "answers to the questions that are the basis of the false oath charge" were "literally true." P. 10a, *infra*. Literally true statements cannot support a false oath conviction. *Bronston*, 409 U.S. at 359-60; *United States* v. *Reynolds*, 919 F.2d 435, 437 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1402 (1991); *United States* v. *Reveron Martinez*, 836 F.2d 684, 689 (1st Cir. 1988); *United States* v. *Lighte*, 782 F.2d 367, 374 (2d Cir. 1986); *United States* v. *Abrams*, 568 F.2d 411, 422-23 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978). Yet, the Court of Appeals said, Robbins falsely identified the corporation as 11th and MacArthur rather than as MacArthur & 11th Properties, Inc., and he "cannot escape a false oath charge by misleading the questioner with false testimony and then supply literally true answers to . . . questions based on his false testimony." P. 10a, *infra*.

Because the indictment did not charge Robbins with lying about the name of the corporation, and the instruction did not direct the jury to consider that offense, the affirmance of Robbins' false oath conviction on that basis simply cannot stand. As this Court stated succinctly in *Dunn*, to

> "uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is

accused." *Dunn,* 442 U.S., at 106.

An appellate court "cannot be concerned with whether the evidence proves the commission of some other crime," because "it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." *Garner,* 368 U.S., at 164. It breaches the right to a trial by jury

> "when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *McCormick,* 111 S. Ct., at 1815 n.8.

The Government did not prove that Robbins' identification of 11th and MacArthur was false. It could show that Robbins actually meant to testify about the assets of MacArthur & 11th Properties, Inc., only by demonstrating that "11th and MacArthur" did not, in fact, exist. Its only evidence was the certificate of the Oklahoma Secretary of State that "*11th and MacArthur Properties, Inc.,*" was not incorporated or authorized to do business in Oklahoma. On its face that certificate did not pertain to the entity about which Robbins testified. Moreover, even if it did, it would not exclude the possibility that 11th and MacArthur was incorporated or authorized to do business in some other state. Such a "mere modicum" of proof could not "by itself rationally support a conviction beyond a reasonable doubt." *Jackson,* 443

U.S., at 320. Particularly is that true in light of the Bankruptcy Court's adversary proceeding findings, of which this Court can take judicial notice, that 11th and MacArthur did, in fact, exist. The Bankruptcy Court specifically mentioned 11th and MacArthur five times. Pp. 25a, 28a-29a, 31a, *infra*. In short, the Government did not prove its case.

Furthermore, had the Government proven the nonexistence of "11th and MacArthur," it would have proven far too much: If "11th and MacArthur" did not exist, it necessarily could have had no assets. And it was precisely Robbins' literally true testimony that 11th and MacArthur had no assets that the Court of Appeals held was the "basis for this perjury charge." P. 10a, *infra*.

This Court has never hesitated to reverse lower court decisions affirming criminal convictions on grounds other than those charged or tried. *McCormick,* 111 S. Ct., at 1815; *Eaton,* 415 U.S., at 699-700; *Cole,* 333 U.S., at 201. *See Dunn,* 442 U.S., at 106-07. *See also Garner,* 368 U.S., at 164. Neither should it hesitate to do so here. Given the clear command of this Court's decisions, the Court of Appeals' affirmance of Robbins' conviction for making a false oath deprives Robbins of the due process of law that the Fifth Amendment guarantees. U.S. CONST. amend. V. Robbins was "entitled to have the validity of [his] conviction[] appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole,* 333 U.S., at 201. The Court of Appeals' affirmance on a wholly different ground conflicts with the applicable decisions of this Court and so far departs from the accepted and usual course

of judicial proceedings that it warrants this Court's exercise of its supervisory power. *See* SUP. CT. R. 10.1(a), (c).

This case is appropriate for summary reversal. *See Eaton*, 415 U.S., at 700; SUP. CT. R. 16.1. The Court therefore should grant the writ of certiorari and reverse the judgment of the Court of Appeals. Alternatively, the Court should grant the writ of certiorari and schedule the case for briefing and oral argument.

B. *The Court of Appeals' decision conflicts with this Court's decision in* Bronston *v.* United States, *with its own prior decision, and with the decisions of other United States Courts of Appeals.*

Bronston rests on the proposition that in a perjury prosecution, words should be taken literally. *See Bronston*, 409 U.S., at 359, 360. Applying *Bronston*, the United States Courts of Appeals, including the Eighth Circuit, have held that a prosecution for false testimony may not rest on a literally true statement. The Court of Appeals' affirmance in this case conflicts with those decisions.

In *United States* v. *Vesaas*, 586 F.2d 101, 104 (8th Cir. 1978), the Eighth Circuit acknowledged that an "indictment premised on a statement which on its face is not false cannot survive." Other circuits have reached similar results. For example, in *Abrams*, 568 F.2d, at 422-23, the Fifth Circuit reversed a conviction for false testimony before a grand jury where there was "no indication in the record" that certain answers were false and the evidence insufficiently established the falsity of others. In *Reynolds*, 919 F.2d, at 437,

the Seventh Circuit vacated a conviction for filing a false tax return where the taxpayer truthfully reported the income for which the form called but failed to disclose other income not reportable on that form. The misleading nature of the return was not enough. *Id.* In *Lighte,* 782 F.2d, at 374, the Second Circuit reversed convictions for false answers to four questions where the answers were actually true. "Because these answers are literally true," the court said, "they obviously cannot support a perjury charge."

In order to support a false oath conviction, therefore, "[a]t a bare minimum, the remark must have been literally false." *Reveron Martinez,* 836 F.2d at 689. "Literal truth is a defense to perjury." *Reynolds,* 919 F.2d, at 437. The Court of Appeals' decision in this case flies squarely in the face of that principle. Inasmuch as the court found that Robbins' "answers to the questions that are the basis of the false oath charge" were "literally true," p. 10a, *infra,* the conviction for the falsity of those answers cannot stand. The Court of Appeals' decision conflicts not only with *Bronston* and the Eighth Circuit's own prior decision in *Vesaas* but with the decisions of other Courts of Appeals as well. *See* SUP. CT. R. 10.1(a).

Alternatively to the grounds discussed in Part A, *supra,* this Court therefore should grant the writ of certiorari to resolve the conflict that the Court of Appeals' decision creates.

CONCLUSION

The Court of Appeals affirmed Robbins' conviction for making a false oath on the basis of a charge that the indictment did not make and on which Robbins

was not tried. That affirmance thus "offends the most basic notions of due process." *Dunn*, 442 U.S., at 106. It conflicts with the applicable decisions of this Court, and it so far departs from the accepted and usual course of judicial proceedings that the Court should exercise its supervisory power. Hence this Court should grant the writ of certiorari and reverse the decision of the Court of Appeals.

Alternatively, the Court of Appeals' decision conflicts with *Bronston* and with the decisions of both the Eighth Circuit itself and other United States Courts of Appeals. This Court therefore should grant the writ of certiorari to resolve the conflict, affirm the reasoning of the other cases, and reverse this decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-3598

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	United States
vs.	)	District Court for
	)	the Western
DENZIL W. ROBBINS,	)	District
	)	of Missouri
Defendant-Appellant.	)	

Submitted: April 15, 1993
Filed: June 28, 1993

Before FAGG and MAGILL, Circuit Judges and STUART*, Senior District Judge.

STUART, Senior District Judge.

I. *Introduction.*

Defendant Denzil W. Robbins appeals from a judgment

* The Honorable W. C. Stuart, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

of conviction on four counts of concealing property subject to bankruptcy court jurisdiction and one count of making a false oath in violation of 18 U.S.C. § 152. Robbins was sentenced to concurrent prison terms of thirty-six months on each count. For the reasons discussed below, we reverse the convictions on the four counts of concealing property of the bankruptcy estate and affirm the conviction for making a false oath.

II. *Factual Background*

On November 16, 1981, creditors filed an involuntary chapter 7 bankruptcy petition against Robbins. Robbins was uncooperative. On August 28, 1986, the bankruptcy trustee, Douglas Evans, commenced adversary bankruptcy proceedings against Robbins to compel him to turn over certain assets to the bankruptcy estate. On September 10, 1986, Judge Koger issued a preliminary injunction enjoining Robbins from transferring or encumbering specified property, including the Finley River Ranch and the Victor Federal stock. Notwithstanding the preliminary injunction, Robbins executed a warranty deed on the ranch on December 17, 1986. Robbins also exchanged the Victor Federal stock for Spectrum Cellular stock. This transaction occurred in late October or early November 1986. In December 1986, Robbins exchanged the Spectrum Cellular stock for beachfront property in Texas and a pecan farm in Mississippi. Robbins then used the beachfront property and the pecan farm as collateral for a loan. These transactions were conducted in direct contravention of the September 10, 1986 bankruptcy court order.

This court has previously considered the adversary bankruptcy proceedings against Robbins. In that case, we affirmed the decision of the district court that affirmed the

decision of the bankruptcy court[1] ordering Robbins to turn over assets to the bankruptcy trustee pursuant to 11 U.S.C. § 542. *See Evans v. Robbins,* 897 F.2d 966 (8th Cir. 1990).

A federal grand jury subsequently returned a six count indictment against Robbins based on many of the same transactions that were before the bankruptcy court. Counts one through five charged Robbins with transferring or concealing property from the bankruptcy estate in violation of 18 U.S.C. § 152. Count six of the indictment charged Robbins with knowingly and fraudulently making a false oath in the bankruptcy proceeding in violation of 18 U.S.C. § 152. The jury returned a guilty verdict on all counts except one count of transferring or concealing certain property from the bankruptcy estate.

Robbins appeals claiming there is insufficient evidence to sustain the conviction for transferring or concealing property from the bankruptcy estate and to sustain the conviction for making a false oath.

III. *Discussion*

A. *Transferring Assets of the Bankruptcy Estate*

In the bankruptcy proceeding, Judge Koger applied the doctrine of confusion of assets and concluded because Robbins had so commingled his assets, it was impossible to trace definitively those he possessed at the time the bankruptcy petition was filed or the manner in which they were acquired. Under this doctrine, Judge Koger found the assets in question to be property of the bankruptcy estate and ordered they be turned over to the trustee.

---

[1]The Honorable Frank W. Koger, United States Chief Bankruptcy Judge for the Western District of Missouri.

In the present criminal prosecution, Robbins filed a motion in limine asking the court to exclude judgment and orders of the bankruptcy court and the affirming opinions of the district court and this court. The court ruled that the 1986 order would be admissible on the issue of notice but the findings of fact of the bankruptcy judge would be inadmissible. However, during the criminal prosecution, Judge Koger was permitted to testify that he found the ranch and stock were assets of the bankruptcy estate under the confusion of assets doctrine.

Robbins contends Judge Koger's testimony cannot supply the evidence to sustain his conviction of transferring or concealing property from the bankruptcy estate for two reasons. First, whether the assets in question belong to the bankruptcy estate is a question of fact for the jury to decide, not Judge Koger. Second, because of the differences in civil and criminal burdens of proof, a bankruptcy court's finding that certain assets are part of a bankruptcy estate is not controlling in a criminal case and is inadmissible to prove the same.

The Government argues (1) that Judge Koger's, opinion was not binding on the jury and it was so instructed, (2) that after the bankruptcy court issued the preliminary injunction on September 10, 1986, Robbins was on notice the court had tentatively concluded the ranch and stock were assets of the bankruptcy estate, and (3) that Robbins' flagrant violations of the bankruptcy court's order by transferring and concealing property that Judge Koger had tentatively found to be part of the bankruptcy estate is sufficient to sustain the conviction.

The Government's argument is factually incorrect. While it is true that Judge Koger's September 10, 1986 order enjoined Robbins from "conveying, transferring,

assigning or encumbering the property described in Exhibit A," and Exhibit A listed the ranch and stock, no specific findings identifying these assets as property of the bankruptcy estate were made. In fact, the bankruptcy court did not find these assets part of the bankruptcy estate until 1988. *See Evans v. Robbins (In re Robbins),* 83 B.R. 688 (Bankr. W.D. Mo. 1988).

The bankruptcy estate includes property interests of the debtor at the commencement of the case. 11 U.S.C. § 541(a)(1). Proceeds of property of the estate are also included in the bankruptcy estate. 11 U.S.C. § 541(a)(6). Accordingly, to find Robbins guilty of transferring or concealing assets of the bankruptcy estate, one of the elements the Government had to prove beyond a reasonable doubt was that the assets in question were Robbins' prepetition assets or they were acquired by Robbins with prepetition assets or proceeds therefrom. *United States v. Grant,* 971 F.2d 799, 802 (1st Cir. 1992). Here, because each count of bankruptcy fraud involved after acquired assets, the Government had to prove they were acquired with prepetition assets or proceeds from prepetition property.

The evidence offered by the Government to prove the after acquired assets were acquired with prepetition property was Judge Koger's testimony. Judge Koger testified that when he entered the preliminary injunction on September 10, 1986, in his opinion, the assets were property of the bankruptcy estate. Judge Koger testified he reached this conclusion even though no evidentiary hearing was conducted at that time to establish whether the assets had been acquired with prepetition property. Judge Koger explained the doctrine of confusion of assets to the jury and testified he had applied this doctrine in the adversary

bankruptcy proceeding to reach the conclusion the assets in question were property of the bankruptcy estate. The bankruptcy trustee also explained the doctrine and reiterated Judge Koger's findings. During the Government's closing argument, the jury was twice reminded that the bankruptcy judge determined these assets were property of the bankruptcy estate. The jury was then instructed the bankruptcy estate may include "property determined to be a part of the bankruptcy estate under the doctrine of confusion of assets." No limiting instruction was given informing the jury that the bankruptcy judge's findings were admissible only on the issue of notice.

We conclude the bankruptcy judge, not the jury, made the determination that these after acquired assets were property of the bankruptcy estate. No evidence of the acquisition of the Finley River Ranch or the Victor Federal stock was offered. The Government relied on the testimony of Judge Koger. Given Judge Koger's opinion evidence, coupled with the jury instruction defining the bankruptcy estate, the jury did not have to find that Robbins, in fact, owned the assets when the bankruptcy petition was filed or acquired them with prepetition property. The jury was only required to find the assets were part of the bankruptcy estate because Judge Koger had made that determination under the confusion of assets doctrine.

We hold when the doctrine of confusion of assets is relied upon in the underlying adversary bankruptcy proceeding to prove the property in issue is part of the bankruptcy estate, the doctrine is not admissible in a subsequent criminal prosecution to prove the same. We reach this holding for several reasons. First, the quantum of proof necessary to sustain the bankruptcy court's finding

is less than that required for a criminal conviction. *See Evans,* 897 F.2d at 968 ("trustee must demonstrate by clear and convincing evidence that the assets in question are part of the bankrupt's estate" in a turnover proceeding). Second, because of the different degrees of proof in civil and criminal cases, "findings of the bankruptcy court that the assets were part of bankruptcy estate are [not] controlling in the criminal case." *United States v. Berry,* 678 F.2d 856, 868 n.10 (10th Cir. 1982), *appeal after remand,* 752 F.2d 499, *cert. denied,* 471 U.S. 1006 (1985). Finally, under the confusion of assets doctrine, the burden of proof is at all times on the trustee; however, once a *prima facie* case is established, the burden of going forward is on the bankrupt to desegregate the assets. *Evans,* 897 F.2d at 968-69. If the bankrupt fails to refute the evidence, the confused assets become assets of the bankruptcy estate. This is a far cry from requiring the Government to prove beyond a reasonable doubt in a criminal prosecution that the postpetition property was acquired with prepetition assets or proceeds therefrom.

Judge Koger's opinion, based on the doctrine of confusion of assets in an adversary bankruptcy proceeding, is insufficient evidence to support a finding by the jury that beyond a reasonable doubt, these postpetition assets were property of the bankruptcy estate.

Robbins' flagrant violations of the bankruptcy court's order could subject him to criminal contempt sanctions but they are not sufficient to support convictions on charges of concealing bankruptcy estate property. We reverse the convictions for transferring and concealing property of the bankruptcy estate.

B. *Making a False Oath*

Robbins next contends there is insufficient evidence to sustain the conviction for making a false oath. On October 27, 1987, Mr. Placzek, counsel for the bankruptcy trustee, deposed Robbins in connection with the adversary proceedings. The following exchange occurred:

Q. [Placzek] Sir, what is 11th and Meridian? Is that a financial institution?
A. [Robbins] No, Huh-uh.
Q. What is it?
A. That was a little corporation that was formed to buy a motel at 11th and—excuse me, I got to back up. Did you say 11th and Meridian?
Q. Yes.
A. I do not know what that 11th and Meridian is. There is a company called 11th and MacArthur.
Q. Okay. And that is a corporation that was formed when?
A. Oh, last couple of years.
Q. Who were the principals of that corporation?
A. I think me and the principals, one of the principals now—well, not now, but it was myself, I guess.
Q. Anyone else?
A. Oh, there was some other people in it for a little bit, but they are gone.
Q. Is the corporation still in existence?
A. Yes, sir. Didn't buy the property it was going to buy.
Q. Does it have any assets?
A. No.
Q. Did it have any assets at any time?
A. No, sir, not that I remember.

No corporation known as 11th and MacArthur was incorporated in the State of Oklahoma. However, a

corporation known as MacArthur and 11th Properties, Inc. was incorporated and Robbins was the president. MacArthur and 11th Properties, Inc. was the payee of a promissory note. By an agreement dated September 23, 1987, the corporation transferred its rights in the note in exchange for real estate and an alfalfa cubing facility. MacArthur and 11th Properties, Inc. did have assets.

Robbins contends the government failed to prove that the oath given by him was, in fact, false. Placzek asked him about "11th and MacArthur," not "MacArthur and 11th Properties, Inc.," and there was no evidence that 11th and MacArthur had any assets or that the corporation existed. Robbins asserts the false oath statute may not be "invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object" of his inquiry. *Bronston v. United States,* 409 U.S. 352, 360 (1973).

Bronston involved an unresponsive answer that implied a "no" answer to the question asked. The Government based its perjury charge on that implication. In addition to the above quote, the Supreme Court said "that any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." *Id.* at 362. The Supreme Court pointed out:

> [w]hether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question—unless there is to be speculation as to what the unresponsive answer

"implies."

Id. at 356 n.3.

Here, no unresponsive answers which could mislead the questioner are involved so we are not faced with this unique problem. Robbins testified a corporation named 11th and MacArthur was formed during the preceding two years and he was the only remaining principal. The questioner accepted this testimony and asked if "11th and MacArthur" had, or if the corporation ever had, any assets. Robbins' "no" answers to these questions are the basis for this perjury charge. The answers to this line of questioning are not unresponsive. They contain "nothing to alert the questioner that he may be sidetracked." *Id.* at 355 n.3.

Even if Robbins' answers "were not guileless but were shrewdly calculated to evade," *id.* at 362, he is not entitled to the protection of *Bronston* because his answers were not "literally true." They were false. Robbins cannot escape a false oath charge by misleading the questioner with false testimony and then supply literally true answers to a questions based on his false testimony.

Absent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of declarant's answer is for the jury. *United States v. Wolfson,* 437 F.2d 862, 878 (2d Cir. 1970). Robbins argued to the jury that he did not testify falsely because the questioner asked about 11th and MacArthur, not MacArthur and 11th Properties, Inc. The jury did not accept that argument.

The literally true answers to the questions that are the basis of the false oath charge must be considered in the context in which they were given. *See Bronston,* 409 U.S. at 355. Robbins' answers cannot be considered in isolation.

See id. at 356 n.3. On this record, the jury could find beyond a reasonable doubt that (1) Robbins was not misled by the question, he knew the question referred to MacArthur and 11th Properties, Inc., he deliberately misstated the true corporate name, and he intended to deceive the questioner by his previous false testimony and literally true answers, or (2) Robbins made an inadvertent mistake in stating the corporate name, yet he knew the questions were referring to MacArthur and 11th Properties, Inc.,[2] the corporation he had organized during the preceding two years. We find sufficient evidence to sustain the guilty jury verdict for making a false oath and affirm the conviction.

III. *Conclusion*

We reverse the convictions on the four counts of concealing property of the bankruptcy estate and affirm the conviction for making a false oath.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[2]The likelihood that Robbins inadvertently made a mistake in naming one of his many enterprises is supported by the court's instructions which referred to "MacArthur and 11th" rather than "11th and MacArthur" and no objections were made to inform the court of this discrepancy.

UNITED STATES DISTRICT COURT
District of Western Missouri

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed Prior to November 1, 1987)

UNITED STATES OF AMERICA
V.
DENZIL W. ROBBINS Case Number: 6:92CR03081-1

Homer D. Wampler III
Defendant's Attorney

THE DEFENDANT:
[ ] pleaded guilty to count(s)_____.
[ ] pleaded nolo contendere to count(s)_____ which (was) (were) accepted by the court.
[X] was found guilty on count(s) 1,2,3,4,6 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC § 152	Bankruptcy Fraud	09/17/86	1
18 USC § 152	Bankruptcy Fraud	10/01/86	2
18 USC § 152	Bankruptcy Fraud	12/01/86	3
18 USC § 152	Bankruptcy Fraud	05/22/87	4
18 USC § 152	Bankruptcy Fraud	10/28/87	6

The defendant is sentenced as provided in pages 1 through 3 of this judgment.
[X] The defendant has been found not guilty on count(s)

5 and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 500-40-7150
Defendant's Date of Birth: 03/15/45

Defendant's Mailing Address:
P.O. Box 160
Horatio, AR 71842

Defendant's Residence Address:
P.O. Box 160
Horatio, AR 71842

11/03/92
Date of Imposition of Judgment

/s/ Russell G. Clark
Signature of Judicial Officer

Russell G. Clark
Senior Judge
Name & Title of Judicial Officer

November 3, 1992

I HEREBY ATTEST AND CERTIFY ON Nov 3 1992

THAT THE FOREGOING DOCUMENT IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY.

R F CONNOR
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF
MISSOURI

BY /s/ Nancy Crighton DEPUTY

IMPRISONMENT

The defendant is hereby committed to the custody of the Attorney General to be imprisoned for a term of 36 months.

36 months on Count(s): 1
36 months on Count(s): 2
36 months on Count(s): 3
36 months on Count(s): 4
36 months on Count(s): 6

36 months each count, on counts 1-4,6 to run concurrently with each other.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at _____ am/pm on _____.
[ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
Prisons
[X] before 2:00 p.m. on 12/07/92 .
[ ] As notified by the United States Marshal.

[ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at

_____,

with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By_____

Deputy Marshal

FINANCIAL OBLIGATIONS

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below:

Count	Assessment	Fine	Restitution
1	$ 50.00	$ .00	$ .00
2	$ 50.00	$ .00	$ .00
3	$ 50.00	$ .00	$ .00
4	$ 50.00	$ .00	$ .00
6	$ 50.00	$ .00	$ .00
Totals:	$ 250.00	$ .00	$ .00

FINE

[ ] The court has determined that the defendant does not have the ability to pay interest in full.
It is ordered that:
[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

Each restitution payment shall be divided proportionately

among the payees named unless specified in the priority payment column below. Restitution shall be paid to the following persons in the following amounts:

Name of Payee	Amount of Restitution	Priority Order of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) fine costs; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be paid as follows:

[X] in full immediately.

[ ] in full not later than _____.

[ ] in installments which the probation officer shall establish and may periodically modify provided that the entire financial penalty is paid no later than 5 years after release from incarceration, if incarceration is imposed. If probation is imposed, not later than the expiration of probation.

[ ] in monthly installments of $_____ over a period of _____ months. the probation officer may periodically modify the payment scheduled provided the penalty is paid in full accordance with the term specified above. The first payment is due 30 days after the date of this judgment. The second and subsequent payments are due monthly thereafter.

All financial penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the above payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Unless otherwise ordered by the court, any financial penalty imposed by this order shall be due and payable during the period of incarceration, with any unpaid balance to be a condition of supervised release. Any financial penalties collected while the defendant is incarcerated shall be reported by the Bureau of Prisons to the Clerk of the Court and the probation officer. The probation officer shall notify the United States District Court, the Clerk of the Court, and the United States Attorney's Office of the payment and any modifications to that schedule.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-3598WMS

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition For
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Denzil W. Robbins,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 27, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE
UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

In Re:	)	
	)	Case No. 81-03534-S-2
DENZIL ROBBINS,	)	
	)	
Debtor,	)	
	)	
DOUGLAS EVANS,	)	
Trustee,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 86-0377-S-2
	)	
DENZIL ROBBINS, et al.	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having considered the pleadings of the parties and the evidence adduced during the trial of this action, issues the following findings of fact and conclusions of law:

Findings of Fact

1. The adversary proceeding before the Court arises out of an involuntary petition of the bankruptcy filed against Denzil Robbins (hereafter referred to as Debtor) on

November 12, 1981. Thereafter, on November 2, 1983, Debtor was adjudicated bankrupt.

2. On August 28, 1986, Trustee filed a Complaint to Compel Turnover naming Denzil Robbins, Roberta Robbins, Finley River Ranch Co., The Inn Group, Inc., Art Davidson, Kaw Valley State Bank, First National Bank of Del City, and others as defendants. Defendants Denzil Robbins, Roberta Robbins, Finley River Ranch Co., Kaw Valley State Bank, First National Bank of Del City, and The Inn Group filed an answer, but defendant Art Davidson failed to file an answer or appear at trial and, therefore, is in default. The others named as defendants were not served with process.

3. On February 3, 1988, the Court severed the Complaint to Compel Turnover as it related to Kaw Valley State Bank and First National Bank of Del City, and ordered a separate trial as to said defendants.

4. Therefore, these Findings of Fact and Conclusions of Law relate to the issues between the Trustee and Denzil Robbins, Roberta Robbins, Finley River Ranch Co., The Inn Group Inc., and Art Davidson.

5. *Denzil Robbins' Equity and Assets on the date of the Involuntary Petition for Bankruptcy.* On November 12, 1981, Debtor Denzil Robbins had a net equity of at least $1,642,612.00. This finding of fact is derived from the following:

(a) The tax returns of Denzil Robbins for the years 1981 and 1982 which showed net income of $(3,352.00)* for 1981 and $(4,099.00) for 1982.

* ( ) denotes negative figure anytime used in this document.

(b) The June 2, 1981 financial statement showing net equity of $2,304,865.00, and the financial statement of October 25, 1982 showing net equity of $1,642,612.00.

(c) Denzil Robbins' failure to produce any credible testimony or documentary evidence whatsoever to justify his contention that his assets at the time of the petition for involuntary bankruptcy were only $65,455.00.

(d) Further, by comparing the financial statement of June 2, 1981 with the October 25, 1982 financial statement, it is clear that substantially all the assets mentioned in the June 2, 1981 financial statement were intact in the October 25, 1982 statement. For example, of the 15 items shown on both financial statements, 10 list identical values for the same item. One lists farm equipment at $88,533.00 on the earlier statement, but only $88,530.00 on the latter. Four items show a substantial disparity in valuation—two going up in value and two down. The latter financial statement added two items that were not on the earlier financial statements valued at $100,000.00, and dropped completely two items originally valued at $1,400,000.00 in the earlier financial statements.

6. Any present assets of Denzil and Roberta Robbins were derived from the proceeds of those assets owned by Denzil Robbins at the time of the petition for involuntary bankruptcy. This is because:

(a) The uncontradicted evidence is that Denzil Robbins' income during the period 1979-1986 (the last income tax return filed) is as follows:

1979 - $(1,478.00); 1980 - $(33,465.00); 1981 - $(3,352.00); 1982 - $(4,099.00); 1983 $(3,953.00); 1984 - $476.00; 1985 - $96,057.00; 1986 - $80,096.00. Therefore, Denzil Robbins' established net worth of $15,240,133.00 as described in his December 31, 1986 financial statement flows from the proceeds of the bankruptcy estate** and not from any work or services performed by Denzil Robbins.

(b) Denzil Robbins failed to offer any credible evidence as to how he became a millionaire on October 25, 1982, some 11 months after the bankruptcy, and thereafter how his assets gradually increased to $15,240,133.00. Therefore, the Court must reject the contention of Denzil Robbins that his past bankruptcy assets were derived from his work and labor as opposed to being derived from the proceeds of the bankruptcy estate.

(c) The Court draws an adverse inference against Denzil and Roberta Robbins from the failure of Denzil and Roberta Robbins to produce records on this issue. The Trustee in discovery essentially requested that the Debtor and Roberta Robbins produce their entire financial records for the period 1979 through 1987. The entire documentation produced in response to Plaintiff's request for production of documents (marked at trial as

** The terms "bankruptcy estate" or "bankrupt's estate" refer to those items which should be included as assets of Denzil Robbins as of November 12, 1981, and thus properly are titled to and belong to the Trustee in Bankruptcy by virtue of Denzil Robbins being adjudicated bankrupt.

Exhibit 12), other than payroll documents, is only 1-1/4" thick. No checks were produced, no real estate contracts were produced, and loan files showing the source of funds utilized to purchase properties were not produced.

Therefore, any and all such assets are assets of the bankruptcy estate.

7. Denzil Robbins formed the following corporations: Gard Corporation, Ashley Hotel Co., Key Investment Co., Pebbletree Hotel Co., Finley River Ranch Co., Eleventh & MacArthur, First Federal Financial, Inc., The Inn Group, Inc., Deegene Hotel Co., Deegene Management Co., Deegene Land Co., Deegene Companies, Shammah Corporation, 400 Meridian. All the assets transferred into each of these corporations were assets of Denzil Robbins and were either assets in existence at the time the petition for involuntary bankruptcy was filed or are derived from the proceeds of said assets. Therefore, any assets of said corporations are assets of the bankruptcy estate.

8. Roberta Northcutt Robbins was the lawful wedded wife of Denzil Robbins at the time of the trial of this action on February 10-12, 1988. Prior to her marriage she was known as Roberta Northcutt. At the time of filing of the petition for involuntary bankruptcy, she was not married to Denzil Robbins.

There is no credible evidence delineating any specific assets Roberta Robbins brought into the marriage. Roberta Robbins, since her marriage to Denzil has not worked (except for a few months as a secretary) nor contributed any money or other assets to said marriage. Therefore, the property now titled or in the past titled in Denzil and Roberta Robbins' names jointly or in Roberta Robbins'

name individually are either assets of the estate of the bankrupt as they existed on November 12, 1981 or flow from the proceeds of said assets of the bankruptcy estate and therefore are assets of the bankruptcy estate. With respect to reaching this finding of fact, the Court notes that defendant Roberta Robbins offered no evidence at trial to show (a) what she brought into the marriage, or (b) that her activities, conduct, gifts received or anything of hers caused or contributed to cause the creation of any of the assets described in the financial statement of December 31, 1986, or any assets presently in the name of Denzil Robbins or Roberta Robbins. The Court draws an adverse inference from the failure of Roberta Robbins to produce any records justifying her claim that some of the assets now claimed by the Trustee are her property and are separate and apart from the bankruptcy estate.

9. The Court specifically finds the following to be assets of the bankrupt's estate:

(a) The property described in the evidence as the Oklahoma property located at 1-44 and Meridian (see attachment A for a legal description of said property);

(b) The property referred to in the evidence as the Finley River Ranch (see attachment B for a legal description of said property);

(c) The horse described in the evidence as Mr. Super Smooth;

(d) The cause of action described in the Colorado lawsuit styled *Denzil and Roberta Robbins v. Malcolm Stewart, et al.*, Case No. 87CV143, in the District Court of Alamosa, State of Colorado, including the $100,000 security deposit placed by

Denzil and Roberta Robbins in the District Court of Alamosa County, State of Colorado, as security for said lawsuit.

(e) A 1985 Jeep Cherokee transferred to Denzil Robbins by Malcolm Stewart and in the possession of Denzil Robbins, Serial Number 1JCNJ15N0FTO84257.

(f) The $40,000 Certificate of Deposit purchased from Security National Bank and Trust Company on or about October 29, 1987.

(g) The properties referred to in the evidence as the Mississippi pecan farm and the beachfront property in Galveston, Texas (see Attachments C and D for legal descriptions of said properties).

(h) Any registered quarterhorses that are now or at any time since November 12, 1981 were in the name of Denzil Robbins or Roberta Northcutt, or Roberta Robbins, or any combination of the same, individually or jointly, including but not limited to Mr. Super Smooth, Roping Chute, Impressive St. Pat, Chickanela Two, and the horses described in Exhibit "E", or the proceeds from the sale of such horses.

(i) The Spectrum Cellular stock described in the evidence.

(j) The Victor Federal Savings & Loan stock described in the evidence.

(k) Those items listed in the following financial statements admitted into evidence:

June 2, 1981; October 25, 1982; May 10, 1983;

December 27, 1983; July 17, 1984; June 15, 1985; September 15, 1985; December 31, 1985; April 30, 1986; August 31, 1986; December 31, 1986 (see Exhibits "F" through "P").

(l) Any ownership interest (stock, equitable or otherwise) which Denzil or Roberta Robbins now have in the following corporations: Deegene Company, Finley River Ranch Co., Ashley Hotel Co., The Inn Group, Inc., First Federal Financial, Inc., Key Investment Co., Deegene Land Co., Deegene Hotel Co., Deegene Management Co., 400 Meridian, 11th & MacArthur, Pebbletree Hotel Co., Shammah Corporation, Gard Corporation.

(m) The 1987 Mercedes titled in the name of Roberta Robbins on October 27th and 28th, 1987.

(n) The art collection in the custody of Roberta and Denzil Robbins on October 27, 1987.

10. Neither Denzil nor Roberta Robbins produced documents sufficient to identify what assets are presently in their possession or under their control. For example, no financial statements were produced for any period on or after December 31, 1986, and that document as well as all other financial statements produced for the years 1985 and 1986 were obtained by the Trustee from third parties and not from Denzil Robbins. At trial Denzil Robbins offered no explanation nor produced any documents to describe or substantiate what he presently owns, and Roberta Robbins did not testify. The foregoing void in the evidence is through no fault of the Trustee, since the Trustee (a) asked detailed requests for production of documents, (b) asked a detailed set of interrogatories, and (c) deposed Denzil Robbins for almost two days in an attempt to elicit detailed

information concerning his assets, all essentially to no avail. Therefore, the Court is cognizant of the fact that there might be in existence assets not known to the Trustee which are in the name of Denzil Robbins, Roberta Robbins, individually or jointly, or in the name of any of the following corporations: Gard Corporation, Ashley Hotel Co., Key Investment Co., Pebbletree Hotel Co., Finley River Ranch Co., Eleventh & MacArthur, First Federal Financial, Inc., The Inn Group, Inc., Deegene Hotel Co., Deegene Management Co., 400 Meridian, Deegene Land Co., Deegene Company, Shammah Corporation. The Court determines that when and if it is discovered by the Trustee any such assets are assets of the bankruptcy estate.

11. The Court specifically rejects the testimony of Denzil Robbins offered by Denzil Robbins at trial as not credible.

Conclusions of Law

1. The proceeding before the Court was brought by the Trustee in Bankruptcy pursuant to 11 U.S.C. § 541(a)(1), (2) and (6).

2. The creation of the corporations, Gard Corporation, Ashley Hotel Co., Key Investment Co., Pebbletree Hotel Co., Finley River Ranch Co., Eleventh &, MacArthur, First Federal Financial, Inc., The Inn Group, Inc., Deegene Hotel Co., Deegene Management Co., 400 Meridian, Deegene Land Co., Deegene Company, Shammah Corporation, and the subsequent transfer of properties by Denzil Robbins into said corporations were with the express purpose of attempting to place any assets put into said corporations beyond the lawful reach of his creditors. Therefore, any conveyances of properties into said corporations by Denzil Robbins were with the intent to defraud creditors in

violation of § 428.020, V.A.M.S., and are null, void and of no effect. See *Bank of New Cambria v. Briggs,* 236 S.W.2d 289, 291 (Mo. 1951); *Conrad v. Diehl,* 129 S.W.2d 870, 877 (Mo. 1939); *Community Federal Savings & Loan Association v. Boyer,* 710 S.W.2d 332, 334 (Mo.App. 1976); *Barnard v. Barnard,* 568 S.W.2d 567, 570 (Mo.App. 1978). Further, said corporations are nothing more than the alter ego of Denzil Robbins and, therefore, said corporate entities should be disregarded as fictitious and have no legal effect. *Consolidated Sun Ray, Inc. v. Oppenstein,* 335 F.2d 801, 806 (8th Cir. 1964); *Fidelity and Casualty Company v. Glass,* 327 S.W.2d 538, 541 (Mo.App. 1959).

3. Title to the numerous assets described in the financial statements admitted into evidence, including numerous horses, motor vehicles, stock were placed by Denzil Robbins in the name of Roberta Robbins (either individually, jointly with Denzil, or in the name of Roberta Northcutt. All of said conveyances were made by Denzil Robbins with the intent to defraud his creditors, and are all null, void of no effect. See *Harrison v. Harrison,* 339 S.W.2d 509, 516 (Mo.App. 1960), and *Barnard v. Barnard,* 568 S.W.2d 567, 570 (Mo.App. 1978).

4. Although Ashley Robbins was not a party to this action, evidence of the transfer of $40,000.00 to purchase a Certificate of Deposit in the name of Ashley Robbins was adduced. Insofar as it affects the rights of Denzil and Roberta Robbins, the Court concludes that this transfer was a fraudulent transfer, made with the specific intent to defraud creditors, and therefore is null, void and of no effect.

5. The Court concludes that all of the property described in paragraphs 9 and 1O of the Findings of Fact are assets of the bankrupt's estate and title to the same

vests in the Trustee in Bankruptcy. This is because:

(a) The Trustee was entitled to an accounting from Debtor and Roberta Robbins concerning (1) assets in existence on November 12, 1982, and what happened to said assets, and (2) the source of funds utilized to procure any assets which are now or since 1981 have been in the name of Denzil Robbins, Roberta Robbins, Gard Corporation, Ashley Hotel Co., Key Investment Co., Pebbletree Hotel Co., Finley River Ranch Co., Eleventh & MacArthur, First Federal Financial, Inc., The Inn Group, Inc., Deegene Hotel Co., Deegene Management Co., Deegene Land Co., Deegene Company, Shammah Corporation, 400 Meridian, or any combination thereof. See 1A C.J.S. Accounting Sec. 50 and 11 U.S.C. § 542(A). The Court concludes defendants Denzil and Roberta Robbins totally failed to account to the Trustee or the Court with respect to said assets as they are obligated to do.

(b) In any event, the Debtor and Roberta Robbins have mingled their assets with those properly a part of the bankruptcy estate, and have failed to identify which goods are theirs. See 15A C.J.S. Confusion of Goods Section 1, 8 (1987) and *South Falls Companies v. Rochelle,* 329 F.2d 611 (5th Cir. 1964). Therefore, all of said assets are a part of said bankruptcy estate.

6. The Court finds that Denzil and Roberta Robbins, in failing to (a) produce documents requested by the Trustee, (b) completely answer interrogatories propounded to them, have done so with intent to conceal evidence which exists, which is in their control and available for

production. The Court, therefore, concludes that all such evidence if produced would be unfavorable to said Denzil and Roberta Robbins and would show that the existing assets of said defendants and the assets of Denzil Robbins' corporations are either assets of the bankrupt's estate or derived from the proceeds of the same. See *Aetna Casualty & Surety Company v. Reliable Tire Company,* 58 F.2d 100, 104 (8th Cir. 1932); *Morris v. Holland,* 529 S.W.2d 948, 953 (Mo.App. 1975); *State v. Walsh,* 327 S.W.2d 713, 717-18 (Mo.App. 1959); *Brodsky v. Brodsky,* 233 S.W.2d 829, 833 (Mo.App. 1950); 31A C.J.S., Evidence, Section 156(2); *Wall v. Lemmons,* 51 S.W.2d 194, 199 (Mo.App. 1932).

7. The Debtor and defendants Roberta Robbins, Finley River Ranch Company and The Inn Group have asserted certain affirmative defenses in paragraphs 18 through 23 of their answer. The Court finds that defendants have offered no credible evidence to support said affirmative defenses and, therefore, rejects the same.

8. The Court orders the Clerk of the Court to enter a judgment in accordance with these Findings of Fact and Conclusions of Law and the Memorandum Opinion filed on March 8, 1988, (1) declaring each and every asset described in paragraphs 9 and 10 of the Findings of Fact as assets of the bankrupt's estate and verify title to the same in the name of the Trustee in Bankruptcy; (2) ordering defendants, and each of them, to turn over to the Trustee in Bankruptcy all of said items in their possession, and to sign any documents necessary to transfer legal title to said documents to the Trustee; and (3) if said items are not in the possession or control of said defendants, to inform the Trustee's attorneys under oath as to what happened to said items, when said event occurred, what consideration was received by defendants for said items, the present location

of said items, and to produce for the Trustee's inspection any documents containing such information.

/s/ Frank W. Koger
Frank Koger, Judge

Date: June 20, 1988